

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MAURICE F.A. BATTISTI
DIANNE K. BATTISTI

CASE NO. 98-66284

Debtors

APPEARANCES:

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Of Counsel

MARK W. SWIMELAR, ESQ.
Chapter 13 Trustee
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter comes before the Court in response to an objection filed by Mark W. Swimelar, Esq., chapter 13 trustee ("Trustee"), to a request for attorney's fees by Robert F. Whalen, Esq. ("Whalen") of the law firm of Thomas, Collison & Meagher. Whalen's request for approval of compensation of \$9,437.50 in attorney's fees and \$684.68 in disbursements was heard at the Court's regular motion term in Binghamton, New York, on July 13, 1999. The matter was submitted for decision by the Court that day.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(A).

FACTS

On October 2, 1998, Maurice F.A. Battisti and Dianne K. Battisti filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). According to the Schedule D, filed with the petition, total secured debt was \$319,127.¹ Debtors also identify \$72,145.42 in real property and school taxes owed on said properties as priority claims. *See* Schedule E. Debtors’ unsecured debt totals \$247,222.31. *See* Schedule F.

The Debtors derive most of their income from the management of several buildings in Endicott, New York. The Debtors’ original plan, filed on October 30, 1998, provides for payments of \$3,472 per month over 60 months providing an estimated dividend to unsecured creditors of 5%. The Trustee filed an objection to the plan on February 2, 1999, contending that any recovery from a personal injury action identified in the Debtors’ Statement of Financial Affairs should be paid into the plan. Also objecting to the Debtors’ plan was Manufacturers and Traders Trust Co. (“M&T”), the Debtors’ largest secured creditor, holding mortgages on two

¹ The Debtors filed amended schedules on January 12, 1999, listing \$485,975.93 in secured debt and \$259,372.31 in unsecured debt. On February 4, 1999, the Debtors amended their schedules to reflect \$472,975.93 in secured debt. Subsequently, on April 5, 1999, the Debtors also amended their schedules to reflect \$247,679.31 in unsecured debt.

of the Debtors' properties for which a receiver had been appointed in the context of foreclosure actions commenced prepetition.² M&T asserted that the plan was unfeasible, citing to the fact that the Debtors had not included maintenance costs on the buildings as expenses and had not established that their projected rental income was realistic.

On February 22, 1999, the Debtors filed a First Amended Plan which included a provision whereby the net proceeds of any recovery on the personal injury action would be turned over to the Trustee. The First Amended Plan also proposed a reduction in the monthly payments to \$2,451 and a reduced dividend to unsecured creditors of 3%. On March 10, 1999, M&T filed objections to the First Amended Plan, contending *inter alia* that the Debtors had underestimated the cost of maintenance on the rental properties and that a 3% dividend to unsecured creditors was inadequate.³

The Debtors filed a Second Amended Plan on March 24, 1999, to which M&T filed an objection on April 2, 1999. On June 21, 1999, the Debtors filed their Third Amended Plan, along with a Stipulation of Settlement reached with M&T. Also on that same day, Whalen filed his motion seeking approval of attorney's fees in the amount of \$9,437.50 and disbursements of \$684.68 to be paid by the Trustee in one lump sum.⁴ On July 7, 1999, the Trustee filed his opposition to Whalen's motion, contending that some of the hours identified in Whalen's time

² On November 10, 1998, Debtors commenced an adversary proceeding seeking turnover of the monies collected by the receiver as rent from the two properties. On October 26, 1999, the complaint was dismissed pursuant to a stipulation executed by the parties.

³ Debtors propose to cram down at least one of M&T's two mortgages with its unsecured claim sharing in any dividends proposed to be paid to unsecured creditors.

⁴ In his fee application, Whalen indicates that he has received payments by the Debtors in the amount of \$2,947, leaving a balance of \$7,175.18 in fees and disbursements to be paid by the Trustee if approved by the Court.

records were excessive. In particular, the Trustee takes exception to approximately 38 hours spent preparing and amending the Debtors' plans. On September 20, 1999, the Court signed an Order confirming the Debtors' Third Amended Plan. Included in that Order is a grant of \$2,500 in attorney's fees with a notation that "[t]here is presently an application for attorney's fees pending."

DISCUSSION

Code § 330(a)(4)(B) addresses compensation of a debtor's attorney in a chapter 13 case in which the debtor is an individual. Code § 330(a)(4)(B) provides that "the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). Those factors include

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3)(A)(A-E).

This Court has previously recognized how important it is that debtors ““have competent, qualified counsel, and it is equally important that counsel be fairly and reasonably compensated . . . [however] this court will not allow the fees of professionals to exceed reasonable limits.”” *In re Thorn*, 192 B.R. 52, 54 (Bankr. N.D.N.Y. 1995) (quoting *In re Copeland*, 154 B.R. 693, 704 (Bankr. W.D.Mich. 1993); *see also In re Yates*, 217 B.R. 296, 302 (Bankr. N.D.Okla. 1998) (noting that attorney’s fees ““must be fair, neither so high that the *res* the proceeding is designed to protect is consumed, nor so parsimonious as to discourage the active participation of competent counsel.”” (quoting *In re Lafayette Radio Electronics Corp.*, 16 B.R. 360, 362 (Bankr. E.D.N.Y. 1982) (citations omitted).

The determination of what constitutes reasonable compensation in a case involves a three-step process. *See American Benefit Life Insur. Co. v. Baddock (In re First Colonial Corp. of America)*, 544 F.2d 1291, 1299 (5th Cir. 1977); *In re Shamburger*, 189 B.R. 965, 967-68 n. 2 (Bankr. N.D.Ala. 1995). First, the attorney seeking compensation must provide the Court with his fee application setting forth the number of hours worked and a description of the work performed. *Id.* Second, the Court is to assess the value of the services. *Id.* Finally, the Court must explain any award it makes. *Id.*

In this case, Whalen has submitted a breakdown of the services he performed on behalf of the Debtors, and the hours incurred. These total 75.5 hours at a rate of \$125 per hour.

Typically, a bankruptcy court uses the lodestar method in awarding attorney’s fees.⁵ *In*

⁵ The lodestar method calculates the fee by multiplying the reasonable number of hours expended by a reasonable hourly rate. *See Howell*, 226 B.R. at 281 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40(1983)).

re Howell, 226 B.R. 279, 281 (Bankr. M.D. Fla. 1998) (citation omitted). In its analysis, the Court must also consider the factors set forth in Code § 330. *See id.* Generally, in chapter 13 cases the courts have also acknowledged that in the majority of such 13 cases the work is rather standardized and there are usually customary or usual fees for services rendered to which there is usually no objection. *See id.*; *Thorn*, 192 B.R. at 55; *Shamburger*, 189 B.R. at 969.

Typical services rendered by an attorney on behalf of a Chapter 13 debtor include (1) preparation and filing of the petition and plan; (2) office and telephone conferences with the debtor and creditors to discuss objections to the plan or various claims; (3) appearance at the § 341 meeting of creditors and (4) appearance at the confirmation hearing. *See In re Allen*, 1995 WL 548855 at *2-3 (Bankr. S.D.Ga. 1995). It may also be necessary to make an appearance in court “in the event that lien avoidance, adequate protection, dismissal, stay relief, or claims objection issues become contested matters or adversary proceedings.” *Id.* at *2.

Thorn, 192 B.R. at 54.

It would appear that the only thing distinguishing this case from the typical chapter 13 case of an individual debtor is the fact that a substantial portion of the Debtors’ regular income is derived from rental properties. As a result, Whalen was required to perform an analysis of that income, as well as the expenses associated with the various income-producing properties in preparing the Debtors’ petition, schedules and plan. Other than having to address the objections raised by M&T concerning the Debtors’ proposed treatment of its claims with respect to mortgages on 412 Adams Avenue, Endicott, New York, and 2 Washington Avenue, Endicott, New York (“M&T Properties”), the only other services performed by Whalen which appear to be out-of-the-ordinary are those rendered in connection with an adversary proceeding commenced against M&T and the receiver appointed in connection with M&T’s prepetition efforts to foreclose on the M&T Properties, as well as a motion brought on by Order to Show

Cause seeking turnover of funds collected as rent by the receiver.

Pursuant to Code § 330(a)(3)(A)(A-B), the Court has reviewed the time spent on the various services rendered by Whalen, as well as the rates charged for his services. The Court finds that Whalen's rate of \$125 per hour is reasonable. The Court also concludes, pursuant to Code § 330(a)(3)(A)(C), that for the most part the services were necessary to the administration of the case.⁶ With respect to whether the services were performed within a "reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue or task addressed" (11 U.S.C. § 330(a)(3)(A)(D)), the Court makes the following findings:

With respect to the adversary proceeding against M&T and the receiver, as well as the Order to Show Cause, Whalen met with the Debtors, conducted research and prepared the necessary papers. These services comprised 10.1 hours according to Whalen's fee application, for which the Court finds full reimbursement reasonable.

Whalen also identifies a total of 4.8 hours of travel time for which he sees compensation at his full hourly rate of \$125.00. As is the practice in this Court, travel is to be reimbursed at half the normal hourly rate. Therefore, the Court will approve compensation for 2.4 hours in travel.

Of the remaining 63 hours, approximately 45.5 hours are identified as hours spent in preparing the Debtors' plan and schedules, as well as subsequent amendments to both. Before addressing the reasonableness of those hours, the Court would note that the final 17.5 hours for

⁶ While Whalen's affidavit in support of his fee application references a 150 page document provided to the Trustee and various creditors detailing the nature of the Debtors' financial affairs over recent years, said document was not provided to the Court. The Court has serious reservations concerning the necessity of such a document when one examines the overall nature of this case, including the fact that the dividend to unsecured creditors is only 3%.

which Whalen seeks \$2,187.50 in compensation were spent in what the Court deems to be routine matters associated with a chapter 13 case, including attendance at the meeting of creditors and hearings on confirmation, as well as conferences with the Debtors and with counsel for M&T.⁷ Compensation for these hours far exceeds what the Court recognizes as the normal range in a chapter 13 case of between \$600 and \$1,200. The Court deems it appropriate to approve 11 hours in connection with these services as being reasonable.

Finally, the Court considers the 45.5 hours spent in connection with the Debtors' schedules and plan:

On October 27, 1998, and October 28, 1998, Whalen lists 9 hours spent preparing a plan, which consists of a one page document in which he identifies a monthly payment of \$3,473 over 60 months with a 5% dividend to unsecured creditors based on payments of \$200 per month or a total of \$12,000. He also lists payments to six creditors deemed to be secured, including the two mortgages on the M&T Properties and four entities owed either school or real property taxes. The Court finds 9 hours clearly excessive for the preparation of said document and, accordingly, will approve 1 hour for the services rendered October 27-28, 1998, as this information should have been readily available to Whalen after preparation of the Debtors' petition.

On December 15, 1998, and December 29, 1998, Whalen identifies 5 hours spent in amending the Debtors' schedules. On January 12, 1999, amended schedules A, B, D and F were

⁷ The Court notes that none of the hours identified by Whalen include reference to the preparation of the Debtors' petition. In considering the reasonableness of the fees associated with the overall rendering of routine services, the Court wishes to make it clear that it will not consider any supplemental request for fees in that regard without also considering an adjustment to any fee awarded herein.

filed on behalf of the Debtors. A comparison with the schedules originally filed reveals that there were changes in the value of two parcels of real property, as well as the reclassification of three creditors from secured to unsecured. In addition, Whalen identified additional income of the Debtors, including rental from property at 518 Woodford Avenue, Endicott, New York, "Weiss mortgage" payments and earnings of Mrs. Battisti. The Court finds 1 hour reasonable in performing such services.

Between January 19, 1999, and February 18, 1999, Whalen lists 25.4 hours spent in preparing an amended plan and amended schedules. With respect to the schedules filed on February 4, 1999, he corrected the claim of creditor Robert Donald by listing it at the amount originally scheduled but subsequently revised in a prior amendment. He also eliminates three unsecured creditors and includes attachments to ¶4(a) and ¶4(b) of the Statement of Financial Affairs which were referenced in the prior Statement of Financial Affairs filed on January 12, 1999, but not included.

Looking at the changes made to the Debtors' plan as originally filed, the First Amended Plan reduces the monthly payments from \$3,472 to \$2,451 with a reduction in the dividend to unsecured creditors from 5% to 3%. The First Amended Plan reflects changes in the amounts to be paid to secured creditors and includes a liquidation analysis and calculation of rental income, arrears on school and property taxes and current school and property taxes. Whalen also includes a couple of provisions for payment on M&T's mortgages outside the plan based on a fair market value of \$72,000 on 412 Adams Avenue and \$68,000 on the 2 Washington Avenue. In response to the Trustee's objection to the original plan, he also included a provision whereby net proceeds from a personal injury action commenced by the Debtors would be turned

over to the Trustee. It is also evident that Whalen has made an effort, in view of M&T's prior objection, to provide the Court, the Trustee and the creditors, as well as M&T, with more information than in the original plan in order for a party in interest to determine the feasibility of the Debtors' plan, particularly with respect to the estimates concerning income and expenses in connection with the various rental properties. The Court concludes that compensation for 10 hours of work in the preparation of these materials is reasonable.

On March 22, 1999, the Debtors filed a Second Amended Plan for which Whalen lists 3.2 hours in services. Based on a comparison of the First Amended Plan and the Second Amended Plan, the only change appears to be in extending payments outside the plan on the 412 Adams Avenue property over 81 months rather than 54 months and a change in the estimated value of the 2 Washington Avenue property from \$68,000 to \$78,000, with the notation that "[t]his value is proposed in an effort to compromise the objections filed by M&T Bank." The Court finds compensation for 1 hour reasonable in connection with the Second Amended Plan.

With respect to the Third Amended Plan, Whalen identifies 2.9 hours spent on April 14, 1999, and May 20, 1999, in preparation of the Third Amended Plan and Settlement of Stipulation entered into with M&T and filed on June 21, 1999. The Court approves 2.9 hours as reasonable in connection with these services.

The Court concludes that Whalen is entitled to compensation for 39.4 hours of services or \$4,965. According to Whalen's fee application, he has received \$2,947 from the Debtors, thereby leaving a balance of \$1,978 in fees and \$684.68 in disbursements for which the Court gives approval.

IT IS SO ORDERED.

Dated at Utica, New York

this 12th day of January 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge